In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Motion to Dismiss
and
Brief in Support of Motion to Dismiss.

FRANCIS X. BELLOTTI,
Attorney General,
Commonwealth of Massachusetts,
JOHN E. BOWMAN, JR.,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1010
Attorneys for the Appellees.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Motion to Dismiss.

Appellees move that the Court dismiss the appeal for lack of a substantial federal question. Dismissal of certain questions presented by Appellants is also moved as the decision below is based on an adequate, non-federal ground. As further grounds for dismissal the Appellees state that the

decision by the Massachusetts Supreme Judicial Court is plainly correct and does not present issues worthy of plenary consideration by this Court.

Respectfully submitted,
FRANCIS X. BELLOTTI,
Attorney General,
Commonwealth of Massachusetts,
JOHN E. BOWMAN, JR.,
Assistant Attorney General.

Date: October 21, 1977.

Department of the Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1010

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Opinion Below.

The opinion of the Massachusetts Supreme Judicial Court is reported at Mass. Adv. Sh. (1977) 895 and at 363 N.E. 2d 474 (1977). The opinion is reprinted in Appendix A to the Jurisdictional Statement.

Jurisdiction.

Appellants invoke the jurisdiction of this Court by appeal pursuant to 28 U.S.C. § 1257(2).

Statutes Involved.

12 U.S.C.A. § 1464(h) (1969):

> No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

Mass. Gen. Laws. Ann. c. 63, § 11 (West, 1977):

> Every savings bank as defined in chapter one hundred and sixty-eight, every cooperative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:
>
> (*a*) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, and (2) one-sixteenth of one per cent of the average amount of its deposits or of its savings accounts and share capital for

> the first six months of the taxable year, after deducting from such average amounts (*i*) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (*ii*) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to a tax by the commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of the commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of such six-month period; and
>
> (*b*) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income, and (2) one-sixteenth of one per cent of the average amounts of its deposits or of its savings accounts and share capital for the second six months of the taxable year, after deducting from such average amount (*i*) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (*ii*) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such

of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of the taxable year.

For the purpose of this section, "net operating income" shall mean gross income from all sources, without exclusion, for the taxable year, less (*i*) operating expenses, (*ii*) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (*iii*) minimum additions during the taxable years to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and "taxable year" shall mean any fiscal or calendar year or period for which the bank is required to make a return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing "net operating income".

Questions Presented.

1. Does 12 U.S.C. § 1464(h) authorize Massachusetts to impose on federal and loan associations domiciled in Massachusetts the franchise tax set forth in Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1)?

2. Does the Commerce Clause, the Due Process Clause, or the Equal Protection Clause of the United States Constitution exempt federal savings and loan associations domiciled in Massachusetts from the tax imposed by Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1)?

Statement of the Case.

The issue on appeal is whether Massachusetts may assess against federal savings and loan associations a portion of the tax set forth in Mass. Gen. Laws c. 63, § 11, which it also imposes on state-chartered savings banks and cooperative banks. Appellants are all thirty-four federally chartered savings and loan associations (hereinafter associations) located in Massachusetts. The associations filed suit in the state Superior Court nearly two years after the United States Court of Appeals abstained on similar claims raised by six of the associations as intervenors in a suit brought by the United States. *United States* v. *State Tax Comm'n*, 481 F. 2d 963 (1st Cir. 1973).[1]

The Superior Court reported the case to the Appeals Court without decision after the parties filed a stipulation of facts (A. 136 *et seq.*). The Supreme Judicial Court granted direct appellate review prior to hearing or decision in the Appeals Court. On May 3, 1977, the Massachusetts Supreme Judicial Court entered a declaratory judgment which affirmed the validity of Mass. Gen. Laws c. 63, § 11 (a)(1), (b)(1), and the associations filed a timely appeal.

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[1]The United States filed suit on behalf of the Federal Home Loan Bank Board which oversees all federal savings and loan associations. 12 U.S.C. § 1437. The United States did not challenge the income-based portion of Mass. Gen. Laws c. 63, § 11, which is the subject of this litigation. The intervenor associations did, however, raise the same issues presented by this appeal.

The United States District Court and the Court of Appeals upheld the United States' claim that the deposits-based portion of the tax violated 12 U.S.C. § 1464(h). The Court of Appeals vacated the judgment entered for the State Tax Commission on the remaining claims and directed the associations to file suit in the state courts. *United States* v. *State Tax Comm'n*, 348 F. Supp. 397 (D. Mass. 1972), 481 F. 2d 963 (1st Cir. 1973).

On its face Mass. Gen. Laws c. 63, § 11, levies an indivisible "excise" tax, which is measured by a percentage of both "deposits" (§ 11(a)(2), (b)(2)) and "net operating income" (§ 11(a)(1), (b)(1)), on both the associations and state savings and cooperative banks. However, the state court litigation dealt solely with the income-based portion of the statute, because the associations (but not the state banks) are exempt from the deposits-based portion of the tax due to the judgment in *United States* v. *State Tax Comm'n, supra,* 481 F. 2d at 971. *First Federal Savings & Loan Assn.* v. *State Tax Comm'n*, ____ Mass. ____, 363 N.E. 2d 474, 478 (1977).[2]

Argument.

I. Introduction.

Massachusetts taxes the "franchise," *First Federal Savings & Loan Assn.*, 363 N.E. 2d at 480, of every "savings bank," "cooperative bank" and "state[3] or federal savings and loan association located in the commonwealth." Mass. Gen. Laws c. 63, § 11 (first par.). Under the express terms of the statute the franchise tax is assessed at a percentage of

[2]Mass. Adv. Sh. (1977) 895, 898. Hereinafter the decision in this case by the Massachusetts Supreme Judicial Court will be referred to as *First Federal Savings & Loan Assn.* For convenience all citations will be to the Northeastern Reporter.

[3]There is apparently only one savings and loan association with a Massachusetts charter. See Mass. Gen. Laws c. 93, § 34. The parties did not raise before the state courts any issues concerning state savings and loan associations, and none are presented to this Court. Accordingly, there will be no further mention of such banks. State credit unions will be discussed in Part II, C, of the Argument, *infra*.

both the taxpayer's "net operating income" (§ 11(a)(1), (b)(1)) and its "deposits" (§ 11(a)(2), (b)(2)). Federal associations and state savings and cooperative banks are treated identically; the statute makes no distinction in the tax rate or the basis upon which it is assessed.[4]

The associations' state law challenges to the statute have failed. This Court is now asked to review further the careful consideration the court below gave their claims that the tax is invalid as applied to the associations because (1) the United States Congress did not authorize the tax in 12 U.S.C. § 1464(h) and (2) the United States Constitution directly shields the associations from the tax. The Argument will address the two claims in turn.

II. The Massachusetts Tax is Authorized by 12 U.S.C. § 1464(h).

The Congress authorized state taxation of federal savings and loan associations in § 5(h) of the Home Owners Loan Act of 1933, 12 U.S.C. § 1464(h). Section 1464(h) gives permission to tax the associations if the tax is not "greater" than the tax levied on "similar" financing institutions. The associations claim that Massachusetts has violated both of these statutory restrictions and also that the Massachusetts tax does not fall within the categories of taxes to which, they argue, Congress limited its authorization in § 1464(h). The Massachusetts Supreme Judicial Court correctly upheld Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1), against all the arguments advanced by the associations. In this portion of the Argument the Appellees will address each of the federal statutory claims raised by the associations.

[4]The federal associations do not pay the deposit-based portion of the tax, however. See Statement of the Case at n. 2, *supra*.

A. *The Claim that the Massachusetts Statute Is Not Within the Categories of Taxes Authorized by 12 U.S.C § 1464(h) Is Insubstantial on its Face and Not Within the Jurisdiction of the Court.*

Section 1464(h) authorizes, *inter alia*, state taxes on the "franchise" of federal savings and loan associations. The state court held the Massachusetts statute levies a franchise tax which is measured by net operating income. *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 480. Thus the tax satisfies even the restrictive reading the associations would give § 1464(h).[5]

The state court's holding that Mass. Gen. Laws c. 63, § 11, is a franchise tax is consistent with its interpretations, dating back to 1815, of similar Massachusetts tax statutes. *E.g., Portland Bank* v. *Apthorp*, 12 Mass. (12 Tyng) 252, 255-56 (1815); *Commonwealth* v. *The People's Five Cents Savings Bank*, 87 Mass. (5 Allen) 428, 431 (1862); *Greenfield Savings Bank* v. *Commonwealth*, 211 Mass. 207, 208 (1912); *Provident Institution for Savings* v. *Commonwealth*, 259 Mass. 124, 126 (1927). The state court has also consistently ruled that a franchise tax does not lose its character merely because, as here, it is measured by income. *State Tax Comm'n* v. *John H. Breck, Inc.*, 336

[5]It is submitted that 12 U.S.C. § 1464(h) generally authorizes state taxes on federal savings and loan associations subject only to the requirement that the tax is not greater than taxes on similar state institutions. This argument was not presented to the state court, and it is not necessary to the decision of the case. The opinion below implicitly adopts the associations' argument, but it concludes the state tax is authorized by § 1464(h) as it is a "nondiscriminatory franchise tax" or, alternatively, a tax on the associations' "income." *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 480, 481 and n. 7. Even if this Court were to disagree with the conclusion that Massachusetts taxes the corporate franchise, affirmance of the judgment below would still be warranted as the tax is either on "such associations or their . . . income." 12 U.S.C. § 1464(h).

Mass. 277, 299 (1957); *Comm'r of Insurance* v. *Commonwealth Mutual Liability Ins. Co.*, 308 Mass. 385, 394-96 (1941). See *Provident Institution for Savings* v. *Commonwealth, supra*, at 125, 126; *Commonwealth* v. *Provident Institution for Savings*, 94 Mass. (12 Allen) 312, 313 (1866).

Prior decisions of this Court directly support the characterization of the state tax adopted below. In *Provident Institution* v. *Massachusetts*, 73 U.S. (6 Wall.) 611 (1867), the Court considered an appeal from the Massachusetts Supreme Judicial Court arising under the predecessor statute to Mass. Gen. Laws c. 63, § 11. See *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 480; *United States* v. *State Tax Comm'n, supra*, 481 F. 2d at 967. The question presented was whether the Massachusetts tax was levied on the savings bank's franchise or on its property. *Provident Institution, supra*, at 623. The Court concurred with the holding below that the franchise was the object of the tax although, as here, the statute did not use that term. *Id.* at 625-28, 631. Later cases have reaffirmed the *Provident Institution* decision. *E.g., Tradesmens National Bank* v. *Oklahoma Tax Comm'n*, 309 U.S. 560, 564-65 (1940) (state tax on national bank); *Baltic Mining Co.* v. *Massachusetts*, 231 U.S. 68, 82-83 (1913) (state tax on business corporations). This Court's decisions also support the Massachusetts court's conclusion that a franchise tax may be measured by income. *Tradesmens National Bank* v. *Oklahoma Tax Comm'n, supra*, at 563-64, 565. See *Provident Institution* v. *Massachusetts, supra*, at 627 (franchise tax measured by deposits); *Society for Savings* v. *Coite*, 73 U.S. (6 Wall.) 594, 608 (1867) (same).

The state court's characterization of Mass. Gen. Laws c. 63, § 11, as a franchise tax is thus a state law decision which is completely consistent with prior decisions. This Court lacks jurisdiction to decide such questions. *Fox Film*

Corp. v. *Muller*, 296 U.S. 207, 210-11 (1935). While the interpretation of "franchise" as used in § 1464(h) is ultimately a federal law question, there is no reason in this case to depart from the usual course of looking to state law for the content of such terms in Congressional enactments. *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 210 (1946).

In fact, in *Provident Institution* v. *Massachusetts, supra*, this Court held it lacked jurisdiction under § 25 of the Judiciary Act of 1789 (now 28 U.S.C. § 1257) to review a decision by the Massachusetts court. The issue was whether the state tax could be measured in part by the bank's investments in tax-exempt federal securities. This Court upheld the state tax, relying on the state court's characterization of the tax as a levy on the bank's franchise. *Id.* at 623, 629-30. See also *Society for Savings* v. *Coite, supra*; *Tradesmens National Bank* v. *Oklahoma Tax Comm'n, supra.*

The federal interest in the *Provident Institution* case was of at least equal significance to the federal interest asserted by the associations here. This case pales by comparison when one considers that here, unlike *Provident Institution*, the Congress has expressly authorized state taxation. The associations' challenge warrants no further consideration by the Court.[6]

[6]The associations also ask the Court to review the holding below that dividends paid to their depositors are deductible "operating expenses" under Mass. Gen. Laws c. 63, § 11 (final par. (i)). The state court carefully reviewed this question, as the statute provides no definition of operating expenses and there was no prior judicial construction of the term. The holding, however, was based on a determination of legislative intent. *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 478. There is no jurisdiction to review this decision of state law. *Fox Film Corp.* v. *Muller, supra*; *Provident Institution* v. *Massachusetts, supra.*

There is also no discriminatory effect on federal instrumentalities because the court's construction of the deduction for operating expenses

B. *Massachusetts Does Not Impose a "Greater" Tax on Federal Savings and Loan Associations in Violation of 12 U.S.C. § 1464(h).*

The associations invite comparison of the tax burden borne by federal savings and loan associations in Massachusetts with the tax on state savings and cooperative banks. Their argument, although seemingly complex, stumbles at the threshold for a simple reason. As noted above, Massachusetts measures its franchise tax by a combination of net operating income and deposits, but only state savings and cooperative banks actually pay the deposits-based portion of the tax due to the judgment entered in *United States* v. *State Tax Comm'n*, 481 F. 2d 963, 971 (1st Cir. 1973). While there is nothing in the record on the actual tax payments by the various institutions, it is clear that the franchise of a state savings or cooperative bank is taxed at a higher rate than the franchise of a federal savings and loan association.[7] See *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 478, 481, n. 8.

In *Tradesmens National Bank* v. *Oklahoma Tax Comm'n, supra*, this Court stated it was necessary, in cases

applies equally to the federal associations and to state savings and cooperative banks. Appellants' argument verges on the frivolous when one considers that 12 U.S.C. § 1464(h) also authorizes taxation of the associations' "income" and that the term "income" has no fixed or settled meaning. Massachusetts is under no federal obligation to provide any deductions from gross income in assessing its tax. See *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 481 and n. 7. The associations' reference to § 591 of the Internal Revenue Code is inapposite.

[7]State banks are taxed 1.254 per cent of net operating income plus 1.250 per cent of deposits (or 2.504 per cent annually). Federal associations are taxed only 1.254 per cent of net operating income.

such as this one, to examine the "whole tax structure."[8] *Id.* at 568. *Accord, Michigan National Bank* v. *Michigan*, 365 U.S. 467, 468-70 (1961); *Bank of Redemption* v. *Boston*, 125 U.S. 60, 66-67 (1888). Here such examination indicates the federal associations received preferential treatment. See *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 481, n. 8. The purpose of 12 U.S.C. § 1464(h) is to bar "discriminatory state taxation" of federal savings and loan associations. *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n*, 365 U.S. 517, 523 (1961). In the absence of demonstrated discrimination on the record, the associations present no issue for decision. See *Michigan National Bank* v. *Michigan, supra*, at 482-83 (different tax rate assessed against national banks does not violate the prohibition in 12 U.S.C. § 548 against a "higher" tax merely because future changes in bank's deposits may alter the practical operation of tax).

Even though this Court has interpreted 12 U.S.C. § 1464(h) on only one occasion, *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n, supra*, plenary consideration of the appeal would not serve to clarify legal principles. The legal test enunciated by *Laurens* is clear, and it was correctly stated and applied by the state court in its decision of the case.[9] *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 480. See also *United States*

[8] In the *Tradesmens National Bank* case income from federal securities was included in the tax base of national banks but excluded from the tax base of other corporations. This Court held there was no discrimination because national banks were not assessed the wholly separate corporate license tax paid by the other corporations. *Id.* at 562, 568.

[9] The assertion at page 14 of the Jurisdictional Statement that the Supreme Judicial Court did not refer to the *Laurens* decision is erroneous.

v. *State Tax Comm'n, supra*, at 969. Moreover, this Court has declared that § 1464(h) is "*in pari materia*" with 12 U.S.C. § 548, which governs state taxation of national banks. Thus the associations and the lower courts can look to the more than fifty-five consistent decisions by this Court in national bank cases when and if the need should arise for further construction of § 1464(h). *Michigan National Bank* v. *Michigan, supra*, at 472-73, 481.[10]

The criteria this Court set forth in the *Michigan National Bank* decision are sufficient to dispose of the associations' arguments in this case. There the Court upheld a state tax which, on its face, imposed on national banks a burden eight times greater than the tax on other banks. The opinion reiterated that the purpose of 12 U.S.C. § 548 was to prohibit state tax structures which create "'an unequal and unfriendly competition'" or which "in practical operation . . . have a discriminatory effect." *Id.* at 473, 470. A finding of "tax equivalence" will satisfy the legal standard. Thus it is not necessary to find "exact equality in result" in order to sustain the state tax. *Id.* at 474. *Cf. Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

The tax burden Massachusetts imposes on the associations easily satisfies the standards defined in both *Michigan National Bank* and *Laurens*. On its face, Mass. Gen. Laws c. 63, § 11, treats the federal associations and state savings and cooperative banks identically. In practical operation, the tax burden falls more heavily on the state banks. Thus the tax has no discriminatory effect on federal interests, and it creates no unequal and unfriendly competition.

The associations nevertheless claim that the statute violates 12 U.S.C. § 1464(h) because Massachusetts permits a deduction from gross income for "minimum additions . . .

[10] Congress amended 12 U.S.C. § 548 effective January 1, 1972. Pub. L. 91-156, § 2(a) (Dec. 24, 1969), 83 Stat. 434. The cases and discussion in the Argument refer to § 548 as it existed prior to Pub. L. 91-156.

to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities." Mass. Gen. Laws c. 63, § 11 (final par., (iii)). Their argument is that federal associations have lower guaranty fund requirements and that they consequently have lower deductions and are taxed more heavily. It is clear, of course, that here the associations seek "exact equality in result"[11] while "tax equivalence" is all the law requires. *Michigan National Bank, supra,* at 474. The factual record does not, in any event, support the associations' argument.

The factual record before the Court is, at best, inconclusive. The clearest support for the associations' claim is in the aggregated comparison of additions to the guaranty fund for all cooperative banks (A. 229), savings banks (A. 230) and federal savings and loan associations (A. 231). Yet in the most recent year (1974) the associations received a greater deduction than either state savings or cooperative banks for additions to the guaranty fund. In comparison to savings banks during the six previous years, the associations got a greater deduction one year (1968), an equal deduction one year (1969), and lesser deductions for four years (A. 229-31).

Another flaw in the associations' case is that their argument is based on comparison of dissimilar items. The record presents only the "assets" of all the associations and state savings and cooperative banks (A. 160-232).[12] The

[11] In actuality, the associations seek complete freedom from taxation while the state savings and cooperative banks would continue to pay the complete franchise tax under Mass. Gen. Laws c. 63, § 11.

[12] Direct comparisons are impossible even at this point, as the record gives only the aggregate assets of all 34 federal savings and loan associations (A. 231).

franchise tax, however, is measured by "net operating income." Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1). It is evident that income represents a return on investment (see A. 158) and bears no necessary relationship to the size of a bank's assets. This Court's analysis in the *Michigan National Bank* case, *supra,* amply demonstrates the inaccurate picture presented by such comparisons.[13]

Assets do not even provide a satisfactory basis for comparing the required addition to the guaranty fund which the various institutions may deduct under Mass. Gen. Laws c. 63, § 11, to arrive at net operating income. For example, a cooperative bank's contribution to the guaranty fund is a portion of its "net profits," Mass. Gen. Laws c. 170, § 38, while a federal savings and loan association's contribution is a portion of its "checking and savings account balances." 12 C.F.R. § 563.13(a)(1) (1977); 12 U.S.C. § 1726(b). Moreover, the "minimum additions" which are deductible under the statute are equal for state savings banks and federal savings and loan associations. Mass. Gen. Laws c. 168, § 58(1) (1/8 of 1 per cent semi-annually); 12 C.F.R. § 563.13(a)(1) (1977) (1/4 of 1 per cent annually).[14]

[13] On the complete factual record in that case the Court was able to ascertain that national bank net earnings were 31 per cent on their capital account compared to 3.4 per cent for other banks and that a share in a national bank controlled 21 times greater moneyed capital than a share in other banks. *Id.* at 472, 477.

[14] Paragraph 10 of the federal associations' charters originally required "general reserves" equal to 10 per cent of "capital" (A. 145, 148). The Federal Home Loan Bank Board subsequently gave all associations the option of amending their charters to the lower reserve requirement stated in the text (A. 150). 12 C.F.R. § 544.8(c)(1)(i). Four of the plaintiff associations have not amended their charters (A. 152, n. 1). Thus they lack standing to challenge the Massachusetts statute, and they present no actual case or controversy for decision on this issue.

The essential point, which is obscured by the associations' arguments, is that the guaranty fund is a portion of surplus which, by law, is not available either for distribution to the shareholders (depositors) or for investment. See, *e.g.*, Mass. Gen. Laws c. 168, § 58(3); 12 C.F.R. § 563.11 (a), (c). The Massachusetts legislature thus could reasonably exclude the guaranty fund from the net operating income which is the measure of the franchise tax imposed by Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1). There is, however, no precise relationship between net operating income and the guaranty fund.

Instead, the tax deduction for additions to the guaranty fund is a variable which is dependent on (1) the annual economic performance of the bank, or (2) the size of its preexisting reserves, or both. For example, a net annual loss of deposits (disintermediation) would ordinarily result in a reduced guaranty fund requirement and no tax deduction. Likewise, an institution which has achieved the required reserves and does not continue to grow will not be entitled to any further deduction in computing its taxable net operating income.

Finally, even if one accepts the associations' claim that their guaranty fund deduction is lower, the higher guaranty fund requirements imposed on state savings and cooperative banks reduces their "deposits available for investment." *Michigan National Bank*, *supra*, at 482. See, *e.g.*, Mass. Gen. Laws c. 170, §§ 37 *et seq.* (distribution of net profits). Thus, like the national bank shareholders in the *Michigan National Bank* case, shareholders in federal savings and loan associations in Massachusetts control greater capital than shareholders in state institutions. *Id.* at 477, 479, 482. From this perspective the Massachusetts tax ". . . is realistic from a business standpoint, does not result in discrimination, is economically sound and is fair to each type of taxpayer." *Id.* at 482.

In sum, the legal principles are settled and were correctly applied in the decision of this case. The associations have failed to carry their burden ". . . to negative every conceivable basis which might support [the tax]." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940) (state tax challenged under Equal Protection Clause). The federal questions are not substantial, and they are not worthy of plenary consideration.

C. *Massachusetts' Failure to Assess Credit Unions the Same Tax It Collects from Federal Savings and Loan Associations and State Savings and Cooperative Banks Does Not Present a Substantial Federal Question.*

The associations maintain that Mass. Gen. Laws c. 63, § 11, is fatally underinclusive because it reaches only state savings and cooperative banks and not state-chartered credit unions. This Court has held, however, that the omission of credit unions from a state tax did not present a substantial federal question under 12 U.S.C. § 1464(h). *First Federal Savings & Loan Assn. of New Haven* v. *Connelly*, 350 U.S. 927 (1956).

The associations' claim must, in any event, be considered in light of the Congressional purpose in § 1464(h) to bar discriminatory state taxation of federal savings and loan associations. *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n*, *supra*, at 523. Their argument that "other similar" local institutions in § 1464(h) must be read to mean *all* similar local institutions lacks substance where Massachusetts has satisfied the statutory purpose by classifying state savings banks and cooperative banks — which are more important institutions than credit unions — with federal savings and loan associations under Mass. Gen. Laws c. 63, § 11.

Moreover, the four courts which have given plenary consideration to the question uniformly concurred with the ruling below that credit unions are not "similar" institutions within the meaning of § 1464(h).[15] *First Federal Savings & Loan Assn. of New Haven* v. *Connelly*, 142 Conn. 483, 492, 115 A. 2d 455, 459 (1955); *Manchester Federal Savings & Loan Assn.* v. *State Tax Comm'n*, 105 N.H. 17, 19-21, 191 A. 2d 529, 531-32 (1963); *State* v *Minnesota Federal Savings & Loan Assn.*, 218 Minn. 229, 238-41, 15 N.W. 2d 568, 573-74 (1944); *United States* v. *State Tax Comm'n*, 348 F. Supp. 397, 400 (D. Mass. 1972), *affirmed on other grounds*, 481 F. 2d 963, 970 (1st Cir. 1973). The United States Congress[16] and the Federal Re-

[15] *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 483-84. In prior decisions the Supreme Judicial Court held state savings and cooperative banks were similar to federal savings and loan associations. *Springfield Inst. for Savings* v. *Worcester Federal Savings & Loan Assn.*, 329 Mass. 184 (1952); *Comm'r of Corporations & Taxation* v. *Flaherty*, 306 Mass. 461 (1940).

[16] In 1934, the year after it created federal savings and loan associations, Congress passed the Federal Credit Union Act, 12 U.S.C. §§ 1751 *et seq.* Credit unions were originally supervised by the Bureau of Federal Credit Unions located in the Department of Health, Education & Welfare. In 1970 Congress created an independent executive agency, the National Credit Union Administration. 12 U.S.C. § 1752a, Pub. L. 91-206 (March 10, 1970), 84 Stat. 49.

Deposit insurance and the convertibility of state and federal charters are two other indicators of the dissimilarity between credit unions and the other institutions. The National Credit Union Administration may insure federal and state credit unions. 12 U.S.C. § 1781(a). See Mass. Gen. Laws c. 171, § 35. The Federal Savings and Loan Insurance Corporation insures federal savings and loan associations and state cooperative banks and building and loan, savings and loan, and homestead associations. 12 U.S.C. § 1726(a). See Mass. Gen. Laws c. 170, § 34A.

A federal credit union may be converted into a state credit union and *vice versa*. 12 U.S.C. § 1771. A federal savings and loan association may convert to a state chartered federal savings and loan "type of

serve Board[17] have also distinguished credit unions from federal savings and loan associations. Finally, two statutory restrictions on credit unions are particularly noteworthy:

(1) credit unions may lend only to "members" (Mass. Gen. Laws c. 171, §§ 2, 21, 24); the other institutions, including the associations, may do business with outsiders, and
(2) credit unions must give "preference" to "personal loans" (*id.* at § 24); the other institutions, particularly the associations, give preference to home mortgage loans. (Compare Mass. Gen. Laws c. 171, § 2, with 12 U.S.C. § 1464(a).)

Thus there is no conflict of legal authority on this issue for the Court to resolve, and Massachusetts has not singled out a federal instrumentality for discriminatory treatment. In the final analysis, decision of this issue would have little precedential value as it would apply only to Massachusetts. The organization of the banking industry and the tax structure in other states would require individualized

institution," 12 U.S.C. § 1464(i); Mass. Gen. Laws c. 168, § 73C (savings bank); c. 170, § 50 (cooperative bank). Any member of a Federal Home Loan Bank may become a federal savings and loan association. 12 U.S.C. § 1464(i). Membership in the Federal Home Loan Bank is limited to savings and loan, building and loan, and homestead associations plus cooperative and savings banks and insurance companies. 12 U.S.C. § 1464(a). See Mass. Gen. Laws c. 168, §§ 67, 73A, 73B (savings bank); c. 170, §§ 34, 49 (cooperative bank).

[17] The Board has classified banks in order to administer the reserve requirements under § 19 of the Federal Reserve Act, 12 U.S.C. §§ 221 *et seq.* Credit unions are included in the definition of bank while federal savings and loan associations are excluded. Rulings of the Federal Reserve Board, 1928 *Federal Reserve Bulletin* 426, 1934 *Federal Reserve Bulletin* 304.

decision. The fact that the question has arisen in only four states since 1933 indicates it is not of widespread importance.

III. Claims that the State Tax Violates the United States Constitution Are Neither Substantial Nor Supported by the Record.

The associations also claim that the tax Massachusetts levies against their franchises violates the Commerce Clause (Art. I, § 8) and the Due Process Clause of the Fourteenth Amendment. These claims will be discussed jointly because the two clauses are "closely related" and rarely analyzed separately where state power to tax businesses engaged in interstate commerce is drawn into question. *National Bellas Hess, Inc.* v. *Illinois Dept. of Revenue*, 386 U.S. 753, 756 (1967). See, *e.g.*, *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, 419 U.S. 560 (1975). The argument will then address the associations' separate contention that the state statute offends the Equal Protection Clause of the Fourteenth Amendment.

The basis for the associations' argument that the state tax violates the Commerce Clause and Due Process Clause is solely that a portion of their loans is secured by real estate located outside Massachusetts. As a matter of law, it is clear that the associations enjoy no constitutional immunity from the state tax as "'[e]ven interstate commerce must pay its way.'" *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). All thirty-four of the associations are domiciled in Massachusetts. Thus each of them has a substantial nexus to Massachusetts and enjoys benefits and protections conferred by the state. See *National Geographic Society* v. *California Bd. of Equalization*, ____ U.S. ____, ____, 97 S. Ct. 1386, 1389 (1977).

The constitutional claim thus rests solely on the facts. The court below carefully reviewed the record and concluded it was "devoid" of evidence to support an exemption from the tax. *First Federal Savings & Loan Assn.*, *supra*, 363 N.E. 2d at 482.[18] The associations have failed to satisfy "[t]he general rule . . . that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." *Norton Co.* v. *Illinois Dept. of Revenue*, 340 U.S. 534, 537 (1951). *Accord*, *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, *supra*, at 563; *Madden* v. *Kentucky*, *supra*, at 88. There is no reason in this case for the Court to depart from its customary practice of leaving undisturbed the facts found by state courts. *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441-42 (1964).

The associations make two unsuccessful efforts to overcome the deficiencies in their case. First, they seek to characterize the statute as a tax on "gross receipts." Jurisdictional Statement, p. 24. Reliance on this formalism — apart from the inaccuracy of the characterization — is misplaced: the test is ". . . whether the tax produces a forbidden effect." *Complete Auto Transit, Inc.* v. *Brady*, ____ U.S. ____, ____, 97 S. Ct. 1076, 1084 (1977). Moreover, gross receipts taxes were upheld even prior to the *Complete Auto Transit* decision last Term. *E.g.*, *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, *supra*; *General Motors Corp.* v. *Washington*, *supra*; *Western Live Stock* v. *Bureau of Revenue*, *supra*.

Next, the associations ask this Court to take "judicial notice" that it is "inconceivable" that the associations (or some of them) did not record mortgages in neighboring

[18] Particularly pertinent is the finding that "[t]he record does not show the extent of the contacts of any association with any other State . . .." *Id.* at 481.

states or that "inevitably" forclosure proceedings were initiated in courts outside Massachusetts.[19] Jurisdictional Statement, p. 24. Here the associations ask the Court to rely on "abstractions" or a "possibility," which is an insufficient basis for constitutional decision. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 462-63 (1959).

Moreover, the associations' reliance on the decision last Term in *National Geographic Society* v. *California Bd. of Equalization*, *supra*, is inapposite, as the opinion carefully notes that it does not adopt the "'slightest presence' standard of constitutional nexus." *Id.* at 1390. The Court upheld California's tax on the Society, which was domiciled in the District of Columbia, because it had offices in California. By contrast, the associations are domiciled in Massachusetts and have no offices outside the state. Perhaps some of the associations send "itinerant drummers" into other states to solicit business, but such facts, if true, would not lay a sufficient constitutional foundation for the other states to tax the associations. *Northwestern States Portland Cement Co.* v. *Minnesota*, *supra*, at 458. See also *National Geographic Society* v. *California Bd. of Equalization*, *supra*; *Western Live Stock* v. *Bureau of Revenue*, *supra*.

In the absence of evidence to the contrary, one may assume the associations' loans secured by out-of-state real estate were negotiated with Massachusetts borrowers in Massachusetts and are also secured by Massachusetts real estate, which would obviate any dispute as to the constitutionality of the Massachusetts franchise tax. See *Western Live Stock* v. *Bureau of Revenue*, *supra*, at 252-53. In any

[19]Mortgages may be foreclosed without resort to the courts. See, *e.g.*, Mass. Gen. Laws c. 244, § 1 (peaceable entry), § 11 (power of sale). But see 50 U.S.C. App. § 532(3) (Soldiers' and Sailors' Civil Relief Act of 1940). *Cf.* Uniform Commercial Code, § 9-503.

event, in *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340, 347, 351, par. 6 (d) (1954), this Court held a state may not impose a tax merely on the basis of a security interest recorded in property which was sold in another state. *Cf.* Uniform Commercial Code, § 9-103(3). Finally, as noted by the court below, a franchise is uniquely incapable of taxation by another state. *First Federal Savings & Loan Assn.*, *supra*, 363 N.E. 2d at 481.

The principal thrust of the Commerce Clause is to protect interstate commerce from multiple taxation. In *General Motors Corp.* v. *Washington*, *supra*, the taxpayer produced specific evidence of duplicate taxation, but its claim still failed as "[General Motors] has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax." *Id.* at 449. *Accord*, *Northwestern States Portland Cement Co.*, *supra*; *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 295 (1944). In this case the associations offer only the possibility of multiple taxation as there has been no showing that other states impose taxes on them. In fact, for part of the period in issue, the State Taxation of Depositories Act, Pub. L. 93-100, § 7, 87 Stat. 342 (eff. Sept. 13, 1973), made it unlawful for states other than Massachusetts to tax the associations.

The Equal Protection Clause claim is not seriously advanced by the associations, nor could it be. No question of constitutionally impermissible classification is raised; the claim is solely inequality of treatment. The salient fact is that the state statute treats the federal associations and their state counterparts identically. If more were needed, the decision in *Lenhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), demonstrates that the claim is plainly unsubstantial. *Lenhausen* held that a state could levy a personal property tax on businesses while excusing individuals

from a similar tax, because ". . . States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Id.* at 359. *Accord, Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527 (1959) (tax cannot be "palpably arbitrary"); *Madden* v. *Kentucky, supra*, at 87 ("broad discretion"). See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (statute does not offend Equal Protection Clause if not drawn with "mathematical nicety or because in practice it results in some inequality"). The Massachusetts statute does not even approach these constitutional boundaries.

Finally, it should be noted that this case does not present an appropriate occasion for constitutional decision. The Congress has regulated state taxation in 12 U.S.C. § 1464(h), and the statute (no "greater" tax on "similar" institutions) covers the constitutional objections raised by the associations. *Cf. Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341, 347 (1936) (Brandeis, J., concurring). This Court has relied on Congressional enactments, rather than the Constitution, in prior cases involving state taxation of federal savings and loan associations, *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n, supra* (12 U.S.C. §§ 1433, 1464(h)), and of national banks, *Michigan National Bank* v. *Michigan, supra* (12 U.S.C. § 548). Similarly, this Court's decisions under the Commerce Clause and the Due Process Clause on the states' power to tax were rendered in the absence of direct Congressional regulation under Art. I, § 8, cl. 3, of the Constitution. *E.g., Complete Auto Transit, Inc.* v. *Brady, supra*; *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue, supra*; *National Bellas Hess, Inc.* v. *Illinois Dept. of Revenue, supra*. There is no reason to depart from this course of decision by giving plenary consideration to the present case.

IV. Reasons for Denying Plenary Consideration.

In recent years the Congress has commissioned two studies on state taxation of national banks and federal savings and loan associations.[20] Decision of the associations' appeal by this Court would have no precedential value as the case principally involves the application of settled interpretations of a federal statute to the facts and there are no conflicting decisions by lower courts. Thus, there is no reason for the Court to give plenary consideration to the appeal where Congress has ultimate authority under the Constitution and is considering further legislation.

The state court carefully considered all the issues raised by the associations, and its opinion is plainly correct on the record of this case. There are no significant federal interests at stake as the associations presently receive preferential treatment under the Massachusetts tax laws. The failure of the United States to join in the associations' challenge to Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1), in the litigation it initiated before the federal courts is alone a significant indication that the claims presented by this appeal are not substantial.

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[20] See Pub. L. 91-156, § 4, 83 Stat. 434 (Dec. 24, 1969), and Pub. L. 93-100, § 7(e), 87 Stat. 342 (Aug. 16, 1973). See also the amendments to 12 U.S.C. § 548 at note 10, *supra*, and the State Taxation of Depositories Act in Part III of the Argument. Pub. L. 94-222, § 1, 90 Stat. 197, extended the State Taxation of Depositories Act to September 12, 1976, as the report by the Advisory Commission on Intergovernmental Relations was not submitted until September 12, 1975. 1976 U.S. Code, Cong. & Admin. News 288.

Conclusion.

The appeal should be dismissed for lack of a substantial federal question. The Court should also dismiss the associations' claim that the state court erred in holding that Mass. Gen. Laws c. 63, § 11, is a franchise tax and that the statutory deduction for operating expenses excludes dividends paid by the associations on the ground that the judgment below rests on an adequate, non-federal ground.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
Commonwealth of Massachusetts,
JOHN E. BOWMAN, JR.,
Assistant Attorney General.

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Department of the Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1010